the one dying (Eveline) should then belong to the other" (Caroline).

For these reasons, the decree of the circuit court, which reaches the result indicated, must be affirmed.

Affirmed.

FENTRESS v. POCAHONTAS FOWLING CLUB.

March 12, 1908.

[60 S. E. 633.]

1. **Ejectment—Trial—Questions for Jury—Conflict of Grants.**—In an action of ejectment, where the parties claim under different grants from the commonwealth, if the junior grant covers land embraced by the senior grant, there is a conflict in the grants to the extent that the same land is covered by both; but it is not a conflict of evidence, nor do the grants contradict each other.

2. **Same—Construction of Grants.**—The construction and legal effect of grants of land from the commonwealth are questions for the court, whether the case is left to a jury, or a jury is waived and matters of law and fact submitted to the court, or the case is withdrawn from the jury by a demurrer to the evidence.

3. **Same—Location of Grant.**—In an action of ejectment, where the parties claim under different grants from the commonwealth, questions as to the true location of the grant and as to the application of either grant to its proper subject-matter are not questions of construction, but of location, to be determined by the jury with the aid of extrinsic evidence.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 17, Ejectment, § 308.]

4. **Same—Effect of Demurrer to Evidence.**—A demurrer to evidence, in an action of ejectment, does not exclude from the consideration of the court the title papers of the demurrant.

5. **Appeal—Reservation of Questions in Trial Court—Necessity of Bill of Exceptions.**—Where no bill of exceptions taken to a ruling complained of, its assignment as error need not be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 2, Appeal and Error, §§ 1432-1468.]

6. **Boundaries—Ascertainment—Courses and Distances Yield to Natural Objects.**—In ascertaining the boundaries of surveys or grants, wherever natural or permanent objects are called for, they control, and courses and distances must yield.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 8, Boundaries, § 12.]

7. Same.—Code 1849, p. 482, c. 112, § 18, in force when a survey was made upon which a grant was based, made it the duty of the surveyor, making a survey, to see that it was plainly bounded by marked trees or other objects, "except where a water course or an ancient marked line is a boundary." The grant described the land as a certain tract of marsh land "bounded on the north by Back Bay, on the east by Knott's Island Bay, on the south by Southwest Cove and Bailey's Island Bay, and on the west by Bailey's Island Bay and Back Bay, and bounded as follows: Beginning at a chinquapin stob on Long Point on Little Cove"—and then called for the courses and distances of 36 lines, without any corners or marked lines, "to the beginning," etc. Held, that the waters surrounding it, and not the courses and distances called for, constituted the true boundary of the land granted.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 8, Boundaries, § 12.]

Error to Circuit Court, Princess Anne County.

Action of ejectment by John A. Fentress against the Pocahontas Fowling Club. Judgment for defendant, and plaintiff brings error. Affirmed.

Leo Judson for plaintiff in error.
W. L. Williams and *B. D. White,* for defendant in error.

BUCHANAN, J. This is an action of ejectment, in which the plaintiff in error was the plaintiff in the court below. The plaintiff claims title under a patent or grant issued in the year 1890 for 3½ acres of land, and which calls for the beginning corner of the land "at a post on the bay in Williams' line."

The defendant derived title under a patent or grant to Thomas Williams and others in 1860, in which the land granted is described as "a certain tract or parcel of land containing 584 acres, 2 roods, and 25 poles, lying in Princess Anne county, being marsh land, known as Long Point, situated to the eastward of Morse's Point, bounded on the north by Back Bay, on the east by Knott's Island Bay, on the south by Southwest Cove and Bailey's Island Bay, and on the west by Bailey's Island Bay and Back Bay, and bounded as follows: Begining at a chinquapin stob on Long Point, on Little Cove"—and then calls for the courses and distances of 36 lines, without any corners or marked lines, "to the beginning, with its appurtenances."

If the grant be construed to "bound on" the bays or waters called for and to run with the sinuosities of their shore lines, which surround "Long Point," it includes the land claimed and sued for by the plaintiff; but if the courses and distances called for shall control, and be established as its boundary, the land claimed by the

plaintiff is not embraced within the grant. The construction, therefore, of the grant in this particular, involves the main point for our consideration, and its decision will be conclusive of the rights of the parties in this case.

Before discussing that point, it will be necessary to consider two preliminary questions raised by the plaintiff in his petition for the writ of error.

After the parties had introduced their title papers and the other evidence relied on to sustain their respective contentions, the defendant demurred to the evidence. It is insisted by the plaintiff that the effect of this was, not only to exclude the parol evidence of the defendant which was in conflict with the plaintiff's evidence, but also the grant under which the defendant claimed, because, as is insisted, it contradicts, or is in conflict with, the plaintiff's grant.

This is manifestly not so. If it were, this result would follow, under the provisions of section 3484 of the Code of 1887 [Va. Code 1904, p. 1862]: If the defendant had not demurred to the evidence, but the case had gone to the jury, or the parties had submitted the whole question of law and fact to the court, and the one had found a verdict, or the other had rendered judgment, against the defendant, and it had brought the case here for review, upon the ground that the verdict or judgment, as the case might be, was contrary to the evidence, this court would have to sustain the judgment, although there was no evidence in the case except the title papers of the parties by which each connected himself with the commonwealth, and uncontradicted evidence that the land sued for by the junior patentee was embraced within the boundaries of the senior grant, under which the defendant derived title; in other words, that the right of the junior patentee, who took nothing by his grant, was superior to that of the defendant who held the commonwealth's title.

If it be true that the junior grant covers land embraced by the senior, there is a conflict in the grants to the extent that the same land is covered by both. But this is not a conflict of evidence. The grants do not contradict each other. The commonwealth issued both. Their construction and legal effect were questions for the court (New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300; City of Richmond *v.* Gallego Mills Co., 102 Va. 165, 172, 45 S. E. 877), whether the case was left to a jury for decision, or a jury has waived and all matters of law and fact submitted to the court, or the case was withdrawn from the jury by a demurrer to the evidence. If there was any doubt as to the true location of the grant, or any question as to the application of either to its proper subject-matter, those were questions, not of construction, but of location, to be determined

by the jury by the aid of extrinsic evidence. Reusens *v.* Lawson, 91 Va. 235, 21 S. E. 347. A demurrer to evidence, in an action of ejectment, does not have the effect of excluding from the consideration of the court the title papers of the demurrant.

The action of the court in excluding portions of certain depositions offered in evidence by the plaintiff is assigned as error. As no bill of exceptions was taken to this ruling of the court, that assignment of error need not be further noticed.

Having disposed of these questions, we will now consider whether or not the land sued for was embraced within the limits of the prior grant, under which the defendant derived title.

The uncontradicted evidence in the case is that the marsh land known as "Long Point" is an island entirely surrounded by the bays or waters called for in the prior grant. In that grant the land is described as marsh land, "known as Long Point, situated to the eastward of Morse's Point, bounded by" certain bays heretofore set out. Then follows the description by course and distance, calling for the beginning corner "at a chinquapin stob on Little Cove," and for the intermediate courses and distances to and including the last line, which are, as appears from the survey made in the cause, in the general direction of the shore line of the waters surrounding the island and called for by the grant. In none of the courses and distances are corners or marked lines called for, except at the beginning corner. There the corner called for is an object on the shore line.

In ascertaining the boundaries of surveys or grants, the universal rule is that, wherever natural or permanent objects are called for as a boundary of the land, they control, and course and distance must yield. French *v.* Bankhead, 11 Grat. 136, 156; Brown *v.* Huger, 21 How. (U. S.) 305, 318, 16 L. Ed. 125; Bruce *v.* Taylor, 2 J. J. Marsh. (Ky.), 160, 162.

In French *v.* Bankhead, *supra,* it was held that the water boundary, though run by course and distance, would be controlled by the actual course of the shore, and that the grant would pass the right to the property to the low-water mark.

In Lodge's Lessee *v.* Lee, 6 Cranch (U. S.) 237, 3 L. Ed. 210, it was decided that the grant of an island by name in the Potomac river, superadding the courses and distances of the lines thereof, which on resurvey were found to exclude part of the island, passed title to the whole of it.

"Where a stream is made the boundary of a grant," says Farnham on Waters and Water Rights, § 420, "the boundary will follow the course of the stream in its meanderings; and the fact that lines are attempted to be run along the bank, which do not in fact correspond with the course of the stream, is immaterial —at least where the corners of the courses designated are not specified."

The fact that neither corners nor marked lines are called for in the grant under consideration is a pregnant circumstance to show that the waters called for, and not course and distance, were intended to define the boundaries of the land, since the statute in force when the survey was made upon which the grant was based made it the duty of the surveyor making the survey to see that the same was plainly bounded by marked trees or other objects, except where a water course or an ancient marked line is a boundary. Code 1849, p. 482, c. 112, § 18.

There is no room for any other legal construction of the senior grant than that the waters called for and surrounding it, and not the courses and distances called for, constitute the true boundary of the land granted.

The judgment complained of must be affirmed.

Affirmed.

SEABOARD AIR LINE RY. *v.* CHAMBLIN *et al.*

March 12, 1908.

[60 S. E. 727.]

1. Evidence—Eminent Domain—Compensation—"Market Value."—The "market value" of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is brought by one who is under no necessity of having it; and in estimating its value all the capabilities of the property, and all uses to which it may be applied, are to be considered.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 20, Evidence, §§ 259-296.

For other definitions, see Words and Phrases, vol. 5, pp. 4383-4388; vol. 8, p. 7717.]

2. Same—Value of Land—Other Purchases.—A railway company having purchased an undivided half interest in real estate at a specified price, under circumstances which show that the purchase was made without compulsion and not by way of compromise, evidence thereof is admissible for the purpose of ascertaining the market value of the remaining undivided half of the same property in a proceeding instituted by the company for its condemnation.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 20, Evidence, §§ 416-419.]

3. Appeal and Error—Estoppel to Allege Error.—A party, after having introduced evidence, cannot be heard to object to its consideration.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 3, Appeal and Error, § 3597.]